

The Top Five 2008

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



Canada (Justice) v. Khadr, 2008 SCC 28

<http://scc.lexum.org/en/2008/2008scc28/2008scc28.html>

In a 2007 decision, R. v Hape, the Supreme Court significantly restricted the application of the Charter outside Canada. Khadr is important because it recognized and applied an important exception to Hape. In it, the Supreme Court held that the Charter could be applied outside of Canada because the United States was in breach of international law. Khadr is the latest in a series of cases to address the application of the Charter to the actions of Canadian officials abroad.

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S. 32(1) of the *Charter* states:

This *Charter* applies

- a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Although the above passage makes it clear that the *Charter* applies everywhere in Canada, its application to Canadians abroad is often a point of contention. There have been several important Supreme Court decisions that have surrounded the applicability of *Charter* rights to Canadians outside of Canada.

In *R. v. Herrer*, [1995] 3 S.C.R. 562 Heidi M. Herrer, a Canadian, was questioned by American authorities in the United States about her boyfriend's escape from custody in Vancouver while awaiting extradition to the United States. The American police did not caution her about her right to counsel in accordance with Canadian standards. When she returned to Canada, Herrer was charged with assisting her boyfriend escape. The Supreme Court found that the admission of the statements she had made to the American police did not violate her right to counsel under s. 10 b) of the *Charter*. The *Charter* did not apply to the actions of the U.S. officials, who were not acting on behalf of any Canadian government but rather were conducting their own investigation.

In *R. v. Cook*, [1998] 2 S.C.R. 597 Deltonia R. Cook was arrested in the United States by U.S. authorities following a murder committed in Canada. The American police read him his Miranda rights and he asked to see a lawyer. Before he was able to do so, he was turned over to Canadian authorities for questioning. The Canadian authorities did not inform him of his right to counsel until after they had asked him a number of questions. Cook sought to have his answers to those questions excluded under s.10 (b) of the *Charter*. The Supreme Court found that, though the general rule in international law is that a country's laws do not apply outside its territory, the *Charter* could apply to acts of Canadian officials outside Canada where:

1. the impugned acts fall within the scope of s.32(1) of the *Charter* for Canadian law enforcement authorities engaged in government action and,
2. the imposition of *Charter* standards will not conflict with the concurrent territorial jurisdiction of the foreign state.

The Supreme Court found the *Charter* applied to the Canadian detectives in *Cook* because they were conducting their own independent investigation of a Canadian citizen for a crime committed in Canada in which the U.S. authorities played no substantial part. Applying the *Charter* to the Canadian police did not interfere with American sovereignty. The Court excluded the statements *Cook* made to the Canadian police.

Cook was the law until the Court formulated a more restrictive test in the 2007 case of *R. v. Hape* [2007] 2 S.C.R. 292. *Hape* was a Canadian businessman who had an office in the Turks and Caicos. The RCMP began investigating him for money laundering in Canada and then conducted a clandestine entry and search of his office in the Turks and Caicos with the cooperation of the Turks and Caicos police. The police did not obtain a Canadian search warrant. At his trial *Hape* argued that the evidence from the search should be excluded because he had been subjected to an unreasonable search and seizure.

In *Hape*, the Supreme Court abandoned the *Cook* test, observing that generally the application of the *Charter* outside Canada would interfere with another country's sovereignty. Comity between nations means that one country should not interfere with another's country's sovereignty within its territory. The Court ruled that in order to apply the *Charter* to a Canadian state actor outside Canada, there must be an exception to the principle of sovereignty that would justify the application of the *Charter* to the activities of the state actor in the territory of another state.

In *Hape* the Court saw no exception to the principle of sovereignty that would permit the application of the *Charter*. The *Charter* did not apply to the RCMP's search in the Turks & Caicos.

The Facts of *Canada (Justice) v. Khadr*

Omar Khadr is the 15 year old Canadian citizen who the American armed forces took prisoner on July 27, 2002 in Afghanistan, as part of military action taken against the Taliban and Al Qaeda after the September 11, 2001 attacks in New York City and Washington. He was 15 years old when he was brought to Guantanamo Bay Prison Camp. Mr. Khadr is currently facing charges of murder and conspiracy to commit terrorism, which are being tried by a U.S. Military Commission at Guantanamo Bay.

On several occasions in 2003 Canadian Security and Intelligence Service (CSIS) agents interviewed Mr. Khadr at Guantanamo Bay for intelligence and law enforcement purposes. The CSIS agents shared the product of these interviews with U.S. authorities.

After formal charges were laid against Mr. Khadr in November 2005, he sought disclosure from the Canadian government of the records of these interviews and all other documents in its possession relevant to the charges against him, invoking *R. v. Stinchcombe*. *Stinchcombe* is the landmark, 1991 Supreme Court decision that states principles of fundamental justice impose a duty on the prosecuting Crown to provide disclosure of relevant information in its possession to the accused whose liberty is in jeopardy. Failure to comply with this need for disclosure may constitute a violation of s.7 of the *Charter*.

The Canadian Government and its officers formally refused Mr. Khadr's request for disclosure in January, 2006. The case then wound its way up to the Supreme Court. Before the Supreme Court, the Canadian government's main argument was that, as indicated by the *Hape* decision, the *Charter* did not apply to the acts of the CSIS agents operating in the U.S.

The Decision

In May of 2008 the Supreme Court decided unanimously that the *Charter* did apply and ordered the Minister of Justice to provide disclosure. The Court found that the process at Guantanamo Bay did not comply with either U.S. domestic law or with international law. Based on this finding the Court applied an important exception to *Hape*: the principles of international law and comity of nations cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. Examples of such international obligations include Canada's commitment to the four Geneva Conventions of 1965, international agreements that, among other things, dictate specific procedural conduct in accordance with the laws of war.

In its reasoning the Court relied on two decisions of the United States Supreme Court: *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

The Canadian Supreme Court noted that in both cases the U.S. Supreme Court had held the operations at Guantanamo Bay to be in violation of the Geneva Conventions and domestic U.S. law. Relying on these decisions the Canadian Supreme Court concluded that "...the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law."

The Court ordered that the Canadian government produce all documents and materials that may be relevant to Mr. Khadr's case to a designated Federal Court judge. That judge will in turn review these materials in accordance with s.38 of the *Canada Evidence Act* and ensure that the disclosure of any materials will not, among other things, compromise national security.

Discussion Issues

1. Do you think the *Charter* should always apply to the activities of Canadian government officials exercising official functions outside Canada?
2. Should Canadian police carry out or participate in a search that is legal in the foreign country where an investigation is being carried out if a similar search would not be legal in Canada?
3. Do you agree with the *Hape/Khadr* test or do you think the more appropriate test is that stated in the earlier *Cook* decision? Do you see as the difference between the two tests?
4. Should the Supreme Court of Canada have pronounced upon the legality of the proceedings happening at Guantanamo Bay itself rather than deferring to the two U.S. Supreme Court decisions? What if there had been no such decisions by the U.S. Supreme Court to adopt?